IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 238

DANIEL W. NORRIS, EMMET L. RICHARDSON and PERRY J. STEARNS, as Executors of the Will of FANNIE W. NORRIS, Deceased,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITION FOR REHEARING AND BRIEF

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Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for Rehearing of Petition for Writ of Certiorari to the United States Circuit Court of Appeals for Seventh Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States.

Come now Daniel W. Norris, Emmet L. Richardson and Perry J. Stearns, as Executors of the Will of Fannie W. Norris, Deceased, petitioners in the above entitled cause, by their attorney, and present this their petition for a rehearing on the order of the Court denying their petition for a writ of certiorari, and in support thereof respectfully show:

1. The decisions of this Court with respect to the deduction of charitable bequests for estate tax purposes only reach two factual situations;

a. Where the charitable remainder is subject to be defeated by the birth of issue to a life tenant and a question arises as to possibility; (B. 40-1)

b. Where the testator gives the life tenant a power to invade corpus if required for necessary support. (B. 41-2)

2. There are other factual situations not yet covered by any guiding decision of this Court with respect to which two or more circuits are at odds, such as:

a. Where the life tenant renounces shortly after decedent's death the power given by will or law to defeat the charitable gift; (B. 47-9)

b. Where a condition precedent is performed shortly after death within the terms of the trust (B. 46-7) whether or not, discretion in the trustees is an element of the condition.

3. In addition to the conflict between the circuits the court below: (1) decided an important question of local law in a way probably in conflict with local statutes and decisions; (2) decided an important question of federal law which has not been but should be settled by this court; and (3) decided a federal question in a way probably in conflict with applicable decisions of this Court. Counsel do not attempt to meet petitioners' showing on these grounds for certiorari and do not even deny their validity except possibly by inference in asking that the petition be denied (S. 14).

4. The court recently granted a petition for writ of certiorari in a case from the First Circuit, *Merchants National Bank of Boston vs. Commissioner*, where as here the question is as to whether a gift is deductible when subject to possible defeat by the exercise of discretion by the trustees. The denial of the writ in this case does not square up with the allowance of it there. Both cases involve the same issue on the point of discretion and justice requires that the charities here involved be treated on the same level of justice, and have their day along with the trustee from Boston.

Wherefore petitioners pray that the order denying their petition for writ of certiorari may be reheard and the writ granted.

DANIEL W. NORRIS,
EMMET L. RICHARDSON
and PERRY J. STEARNS,
Petitioners,
By PERRY J. STEARNS,
Their Attorney.

State of Wisconsin, }
County of Milwaukee } ss

Perry J. Stearns, as attorney for petitioners hereby certifies that the foregoing petition for rehearing and accompanying brief is presented in good faith and not for delay.

PERRY J. STEARNS,
Attorney for Petitioners.

BRIEF ON PETITION FOR REHEARING

I. THE ARGUMENT IN OPPOSITION

Petitioner's brief was presented in orderly fashion in 5 main arguments separately lettered and headed, covering about 50 printed pages. The Solicitor General and associated counsel do not consider petitioners' arguments separately. In less than five full pages counsel give their argument for denial of the writ. The Solicitor General, with the Assistant Attorney General and three special assistants, making five lawyers in all, have confined the argument in opposition to one-tenth the printed space of that of petitioner's argument. (References to their brief are indicated by the letter S.)

Counsel say, "The regulations have received judicial approval" (S. 16 n. 2) as if we were contesting the regulations. Counsel apparently believe that petitioners are attacking the regulations. This is far from the truth. Petitioners support the plain language of Art. 47, Reg. 80 and show why the deduction claimed falls within its terms. (B. 13-24) Counsel do not meet our argument on its own level, or at all. There it stands. It can not do otherwise, since it has not been attacked.

Counsel by saying (pp. 10, 11 n. 2) that Regulation 105, Section 81.46 "in our view makes no change" in Article 47, Regulations 80 intimate that petitioners think otherwise. This is not true. (S. 17) The later regulation states in simpler language the natural meaning of the old. Unfortunately for the clarification of the law and for justice to petitioners, the failure of counsel to discuss the merits of our contentions, so eases their argument over the issues as to obscure, whether intentionally or not, the very fact that there are issues.

Counsel say (S. 10, 11, n. 2) the amendment of 1942 (B. 18) does not affect the instant case. We do not claim that it does. (B. 19) Counsel fail to reply to our argument that it does have a bearing. It shows the intent of Congress that death shall not freeze all rights, and that acts affecting the tax may still effectively be done after death. So Act and Regulation were amended to permit events occurring after death to speak as of the date of death but counsel choose not to discuss the implications thereof. They do not answer petitioners' argument as to the interpretation of the regulation that "the event shall have taken place before the deduction can be allowed."

Counsel say that the Commissioner, the Board of Tax Appeals and the Circuit Court of Appeals agreed below. This is interesting, but not conclusive. Counsel fail to remind the court that the Commissioner and the Board of Tax Appeals are part of the administrative machinery and to that extent at least are adverse to petitioners as taxpayers. The first and only real court of law in the case is the appeal court below. There the court was divided. (R. 188) Furthermore the court quotes at some length with no direct expression of disapproval. Attorney John E. Hughes (R. 183-4) who believes that if when the time of ascertainment of the tax arrives, the condition has been complied with, the bequest should be deductible.

Following the quotation of Attorney Hughes to show the desirable rule, the court points out that the congressional intent to prefer bequests to charity over estate taxes is one "of absolute priority" not to "be whittled down by judicial construction" or by approval "of the practice of the Commissioner of resolving doubts in favor of the Government." Thus the court below comforted the taxpayers by expressions of sound principles. This court has from time to time clearly enunciated the principle that doubts are to be resolved in favor of the taxpayer.

Gould vs. Gould, 245 U. S. 151, 38 S. C. 53 (B. 59)

The court below appears to have formed a strong impression that this principle is one honored by the Commissioner (ergo, by his legal advisers) in the breach. In fact, the court below must have thought the Commissioner was here resolving doubts in favor of the government which the law requires be resolved in favor of petitioners, or there would have been no occasion for the court below to say what it did. (R. 184) Having thus expressed them-

selves favorably to petitioners, why did the court reverse itself in the middle of its own opinion? Because: (1) loopholes should not be encouraged whereby after obtaining the deduction, the executors might not pay the bequest to charity; or (2) the path of the Commissioner should be made easy in the interests of accurate determination of the precise tax? No, this is not it. "Neither * * * uncertainty or possible avoidance of the charitable bequest * * * is here present." (R. 185) Why then the denial? Answer: the "gifts to charity are not absolute." (R. 185) So after condemning the Commissioner for resolving doubts against the taxpayers contrary to rule, the court commits the same error in this that the regulations do not say the gifts must be absolute. The regulation (Reg. 80, Act. 47) say they may be conditional. So the court below adopted the condemned "practice" of the Commissioner and decided to defeat the intent of Congress in this case by construing the law so as to require gifts to be mandatory when in fact the law and regulations say they may be conditional.

There is not only a conflict between the circuits but also a conflict within the Seventh Circuit. Certainly when a court of near-last resort charges the Commissioner of Internal Revenue of the United States with failure to follow the settled rule of construing doubts in favor of the taxpayer as a regular practice — a question of sufficient importance is presented to demand the attention of this Court.

Fair treatment of the taxpayer requires that more than superficial treatment be given to petitioners' reasoned contention that what the court below quotes Attorney Hughes as to the ideal rule, is in fact the rule under the express provisions of law and regulations. Perhaps counsel are persuaded that the times justify a government of men rather than laws. If such is their position they should frankly so state—as the doctrine is out of all harmony with the principles of our government. If that is the issue between us, counsel should have framed it in their brief below—so that we might have approached the Court on common ground. Since they have not met on their merits the issues as stated by us, we might then have met the issue made by them and brought it into the light of public discussion.

Counsel apparently seriously believe that petitioners could have satisfied Columbia Hospital with one cent. If

so why not with a ½ cent postage stamp or 1 red point. Counsel seem to think that one peppercorn however small, would constitute performance of the will. The court below (R. 185) recognized that Wisconsin law governs. We cite Wisconsin statutes and cases (B. 29-34) to show that in Wisconsin a trust is presumed to be imperative. About eight of these cases were not cited below. There is no rule against discovering new cases in working over a brief for the higher court. Yet counsel make no attempt to answer or distinguish these new cases. Their studied policy as evidenced by their brief is to overwhelm by indifference. They are content to say that "The court below after carefully reviewing the authorities (R. 185-9) concluded otherwise." (S. 11, n. 3) But Wisconsin statutes and decisions are conclusive as to Wisconsin law. The Circuit Court of Appeals is bound to accept Wisconsin decisions as to Wisconsin law, as does this court.

An illusory payment of the bequest to Columbia Hospital would not have satisfied the law (B. 33) or the legatee. If by Wisconsin law the bequest is imperative it is mandatory. The ruling of the court below to the contrary is obviously erroneous.

It is an unfair argument (S. 11, 12) that the trustees might have paid the bequest to private individuals and not to Norris Foundation. This assertion entirely begs the question. Court and counsel are here concerned with what was done and not what might have been done if the payment to Norris Foundation had not been made. If the trustees had dilly-dallied as in some of the cases where the deductions properly were not allowed, because the transfer was not made before the deduction could be allowed, we should not be claiming the deduction here. But petitioners properly complain that the fact that they might have delayed and retained the power to pay to private non-charitable purposes is used against them, when such is not the fact. The simple question presented by our petition for the writ is whether the transfer meets the terms of the regulations. Yet *mirabile dictu* counsel in their argument do not quote the regulations. To be sure they set them forth in the appendix. (S. 16) But they do not bother to turn them over, or hold them up to the light, to see the solid matter shining through the skin of the living thought of congress; and of the Commissioner—when he was speaking generally—on principle. So counsel

urge that the purpose of Congress be defeated—and that the deceased who acted on the offer of Congress in a reasonable manner go unrewarded—tricked out of an honest purpose. It is proposed to defeat Congress and testatrix not by a full showing on the merits—but by a shadow—a red herring—an illusion. To interpret the act and regulations allowing gifts subject to conditions precedent—so as to preclude all gifts where the condition occurs after death or is subject to discretion is to destroy as deductions a substantial percentage of legal conditional bequests. To state this proposition is to demonstrate that Congress never intended it. To say that the condition cannot depend upon human volition is obviously demonstrable as error: (1) because most conditions depend upon human action or intent; and (2) because neither the Congress nor the Commissioner set up any such unnatural restriction.

One searches Counsel's argument in vain for a statement of the general rules which should obtain as to discretionary conditional bequests—a reasoned explanation of the law and regulations to demonstrate why they do not apply to the facts in this case.

Counsel claim, "In similar situations (i.e. to petitioner's) courts have quite uniformly denied the claimed deductions." (Citing 3 cases) (S. 12). Counsel choose not to meet our contention that these cases are distinguishable. *Burdick vs. Commissioner*, 2 Cir., 117 F. (2) 972, (B. 56, 57) does not consider the contentions made by us. The court there clearly relied upon the second paragraph of Art. 47, Reg. 80, having to do with conditions subsequent, and entirely disregarded the paragraph of the article relating to conditions precedent. The gift there in question, as here, was subject to a condition precedent, and the provision of the article relating to conditions precedent, upon which we rely, was not applied or seemingly considered to have any bearing. Counsel for Commissioner forebear discussing this discrepancy in that case.

Mississippi Valley Trust Co. vs. Commissioner, 8 Cir., 72 F. (2) 197, 199, (B. 51), upon which counsel rely, is clearly distinguishable because no real trust was set up, such as was created by the will of Mrs. Norris. The gift there was merely precatory and rested with the ultimate beneficiaries. The gift when made was more a gift from their pockets than a gift by the decedent. Such is not the case under Mrs. Norris' will because the trustees as such

have no personal interest in the remainder, and the majority of them could not possibly have benefited if the gifts had been withheld. The transfers to Columbia Hospital and Norris Foundation were testamentary because provided for by the will of Mrs. Norris. By Wisconsin law they are imperative (B. 32), and by the established doctrine of relation back the transfers were those of the deceased. The claim that the trustees cannot be given any discretion by testatrix and the transfer must be mandatory in the sense of permitting no like exercise of discretion by the trustees is an innovation on the law, containing no support in the law of regulations. Counsel do not discuss these charges. *Robbins vs. Commissioner*, 1 Cir., 111 F. (2) 828 (B. 37) is so clearly distinguishable, we are surprised that it should be cited. It should not be necessary to cite a case where the transfer was the result of a compromise *de hors* the will and not testamentary in its nature.

That counsel read petitioner's brief we assume, because of the slight reference thereto. (S. 11, n. 3) The cases which they say we assert support our application for a writ are found in the petition, although it was also stated that in addition there were "a number of other cases discussed in the brief." (Pet. 2)

Counsel disregard eight additional cases cited in our brief as showing that this Court, and the Second, Third, Fifth, Sixth and Eighth Circuits recognize that the doctrine of relation back must be taken into account in tax cases as well as in general law. (B. 44) A tax act must take the general law as it finds it, and the general law is not to be distorted in order to support the exaction of the tax, however substantial.

An examination of our brief will disclose that additional cases were cited (B. 46), such as *Potter vs. Bowers*, 2 Cir., 89 F. (2) 687, where the transfer was dependent upon the creation of a corporation, and the corporation was not created until over two years after death. In *Mead vs. Welch*, 9 Cir., 95 F. (2) 617, the Commissioner strenuously contended that the value of the transfer could not be determined on the basis of any data known as of the date of death. There are at least ten cases cited in the brief in addition to those in the petition, to show that the theory upon which he court below based its decision is not in harmony with those of this court and other circuits. Coun-

sel disregard these cases and confine their attention to only those cited in the petition.

While the Solicitor General may be privileged to disregard these cases, if he believes such tactics politic, yet this Court should not disregard them.

The Court should grant the writ and require the Solicitor General to show why the principle in *Helvering vs. Safe Deposit & Trust Co. of Baltimore*, 316 U. S. 56, and *Helvering vs. Grinnell*, 294 U. S. 153 (B. 29) does not apply, requiring the Commissioner to take into account events subsequent to the testator's death insofar as they determine inclusions and exclusions under the United States estate tax law. Devoting their discussion only to the three cases cited in the petition, and leaving out the other cases showing a conflict between the circuits and this Court, counsel proceed to argue "that no such conflict exists." (S. 12) They say that in *Brown vs. Commissioner*, 3 Cir. 50 F. (2) 842 "the trustees were directed to distribute the funds as they might deem best." Yet they say the case is distinguishable, although their argument is based upon the fact that the payments made by petitioners were "at their discretion and option." (S. 11) We hesitate but are compelled to say that distinguishing between two cases so analogous is sophistry or casuistry on its face, and appears to us to be fallacy. To be sure, in the *Brown case*, the testator had conferences with his trustees and instructed them that they were to bear in mind his ideals (S. 12, 13), but there is no substantial distinction between these facts and the expression by the testatrix here "that the enterprises which I have been interested in be given the preference." (R. 4, 26, 146, 178) (B. 7) In both cases, the transfers were provided for by a will, a written instrument to which we must look to determine the powers, rights, and duties of the trustees. Counsel seek to explain away (S. 13) the fact that the Court held that the designation of the church related back to the decedent's death, first on the ground that Pennsylvania law, there applied, does not aply here and, second, that the "positive command of the decedent was thus supported." Driven to the necessity of distinguishing the two cases counsel have brought themslves to find that the direction to the trustees to distribute "as they might deem best" (S. 12) is a "positive command." (S. 13) Thus, in one short paragraph, the authors are able to bring themselves, for their purpose of

depriving petitioners of a hearing on the merits, to the point of having a clear expression of discretion twisted to a positive command. Counsel distinguish *Meierhof vs. Higgins,* 2 Cir., 129 F. (2) 1002, on the ground that by actuarial tables, the court was able to assign a definite value to the contingent remainder. This is truly irony. A transfer which is still contingent at the time when the deduction is to be allowed, is permitted to be deducted because of reasoned guess work set forth and published in experience tables. As a matter of fact, the charitable transfer might be substantially reduced because of actual experience being different from the norm. Here the Commissioner argues the deduction should be denied although no guess work is required because contingency has occurred prior to determination of the tax, and the value is determined to the exact cent. If the Court issues the writ of certiorari in this case examination into the law will disclose that the same principles which actuated the decision in *Ithaca Trust Co. vs. U. S.,* 279 U. S. 1514, apply here to permit the deduction.

The trustees, contrary to the contention of counsel, do not have it within their power to make another disposition of the fund. The transfers to Columbia Hospital and Norris Foundation were absolute; were made within the time provided by the regulation, and under the law as stated in *Brown vs. Commissioner,* 3 Cir. 50 F. (2) 842, and other cases upon which we rely. The transfer by them is conclusively presumed to be that of the decedent as of the day of her death.

Taxing laws are not intended to change general law, but are to be administered in the light of such general law as was done in the *Brown case,* and should be done here.

In *Smith vs. Commissioner,* 1 Cir., 78 F. (2) 897, the Court found that by Rhode Island law a compromise agreement related back conclusively as though contained in the will. Counsel again reiterate that the *Smith case* was overruled by the *Robbins case,* and have no answer for our statement that the *Robbins case,* dealing with Massachusetts law could not overrule the *Smith case* dealing with Rhode Island law. For counsel (S. 14) to distinguish the present case from the *Smith case* because in the present case there was no compromise is to confuse the issues without excuse. Counsel well know that we do not claim that there has been any compromise under the will of

Fannie W. Norris, Deceased. The point which counsel obscure is that the general doctrine of relation back is to be applied in the determination of taxes as well as in the determination of general rights. Counsel have no argument in answer to our showing that the county court in Wisconsin necessarily held, in permitting the deduction of the transfers in question for Wisconsin inheritance tax purposes, that the transfer related back to the date of death, (B. 38, 39), as if specifically provided for by will. That is the Wisconsin law of this case by which Commissioner is bound. The doctrine of relation back is one of general application and applies in all states in the absence of express provision to the contrary.

Counsel conclude "The decision is correct; there is no conflict; the petition should be denied." The very statement of this conclusion evidences what is palpable throughout the brief that it is devoted only to the first paragraph of reasons given by petitioners for the allowance of the writ (Pet. 2) namely, conflict between the circuits. The brief devotes no attention and makes no conclusion with respect to the remaining points 2-10, of the petition.

Rule 38 of the Rules of the Supreme Court, at 5 (b) provides that a review on writ of certiorari is a matter of sound judicial discretion and will be granted where there are special and important reasons therefor, such as (1) where a Circuit Court of Appeals has rendered a decision in conflict with a decision of another circuit, or (2) has decided an important question of local law in a way probably in conflict with applicable local decision, or (3) has decided an important question of Federal law which has not been but should be settled by this Court, or (4) has decided a Federal question in a way probably in conflict with applicable decisions of this Court, or (5) has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision.

Counsel have devoted their entire attention to the first reason: i.e., that of conflict. It appears from our brief that not only is there this conflict, but also the Circuit Court of Appeals has decided a question of local law in a way probably in conflict with applicable Wisconsin decisions; has decided an important question of Federal law which has probably been settled by this Court in a different man-

ner, or if it has not been settled should be settled by this Court.

The *ratio decidendi* in the Board of Tax Appeals was that the deduction could not be had because supposedly the transfer was subject to power of diversion under the second paragraph by Reg. 80, Art. 47. But the appeal court found there was no power of "diversion." (R. 181) The confusion in the law in this important subject is illustrated by the confusion in the opinions below. The subject of what conditional bequests are deductible is so important that this court should take jurisdiction and give that solid study to the law and regulations which the issues require in order to do justice to innocent taxpayers and charities which are being misled continually over the land because of a misleading inconsistency between regulations and practise.

II. COMMISSIONER SEEKS REPUDIATION OF CONGRESSIONAL OFFER ACCEPTED BY DECEDENT

The estate tax law permitting the deduction of charitable bequests is an offer by Congress to prospective testators. *Y.M.C.A. vs. Davis*, 264 U. S. 47, 50; 44 S. C. 291, 292.

The regulations are part of the Act and therefore part of the offer. *Helvering vs. R. J. Reynolds Tobacco Co.*, 306 U. S. 110, 115; 59 S. C. 423, 426.

The Act and regulations (Reg. 80, Art. 47) offer to prospective testators the deduction of conditional charitable bequests in computing the estate taxes on their estates, providing, however, that the conditional event occur before the tax is computed. The prospective testator desiring to accept the offer puts his affairs in order and makes a will valid under the law of Wisconsin. He dies and his trustees perform the condition before the estate tax return is filed and the tax computed. Then, at last, the offerer, by its representative, the Commissioner of Internal Revenue, says "Oh no you don't." The Commissioner thus repudiates the offer and says that the regulation does not say what it seems to say. Although the regulation does not say that the condition need be imperative or mandatory, and does not prohibit conditions dependent upon the exercise of discretion, yet, such prohibitions are in effect added to the

Act and regulations by the disallowance of the deduction, and the decision below. It is a familiar rule of law that the parties to a contract are bound by the writing. Further, the writing will be given its ordinary meaning except where it produces an ambiguous result. The rule is well stated in Restatement, Contracts, 310, Sec. 230, as follows:

> "The standard of interpretation of an integration, except where it produces an ambiguous result, or is excluded by a rule of law establishing a definite meaning, is the meaning that would be attached to the integration by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, other than oral statements by the parties of what they intended it to mean."

So, the offer that the deduction might be taken if the conditional event occur "before the deduction can be allowed," should be given its ordinary meaning. For the Commissioner to raise doubts which are not expressed in the offer, and to impose tests not expressed in the integration accepted by decedent is to repudiate the contract. Repudiation by a government or its agents involves the honor of the nation. It is imperative, therefore, that this attempted repudiation of the offer by the Commissioner be subjected to careful examination by this Court, and that petitioners be given the benefit of the contract accepted by their decedent, in accordance with the ordinary meaning of the language of the offer.

The repudiation by an administrative official of an open offer made by Congress is so offensive to the honor of the country, and raises so important an issue as to make imperative a careful examination of the law and the facts by the highest court in the land.

III. CERTIORARI GRANTED IN ANALOGOUS CASE

From the report for October 21, 1943, Prentice-Hall Federal Tax Service, Par. 61,001, it appears that on or about May 3, 1943 certiorari was granted in the case of *Merchants National Bank of Boston vs. Commissioner*, 132 F. (2) 483, No. 30, October Term, 1943, decided by United States Circuit Court of Appeals, 1 Cir., Dec. 30, 1942. The writ was granted on the petition of the taxpayer.

It appears from the opinion of Judge Mahoney that the

will of the decedent, Ozro M. Field, gave the net income to his wife for life with the right to pay to her or for her benefit such sums from the principal of the trust fund as the trustee in *its sole discretion* should deem wise and proper for the comfort, support, maintenance, and happiness of the wife, and that such discretion should be exercised with liberality to the wife, and should consider her welfare, comfort and happiness prior to the claims of residuary beneficiaries under the trust. The Court says:

> "Here there can only be an invasion of the corpus of the trust if, in the sole discretion and wisdom of the trustee, an invasion of the principal is deemed necessary for the happiness of the widow."

The judge seems to have injected the word "necessary" as the will, quoted earlier, merely said "wise and proper." Since the Court has granted certiorari in a case where the possibility that the residuary charitable beneficiary may receive nothing, dependent upon the exercise of discretion by the trustee, the reasons are even stronger why certiorari should be granted in this case where the discretion of the trustees has already been exercised, and the amount that the charitable transferees receive is absolute in fact and definite and certain in amount.

CONCLUSION

It is an old adage that we all eat at least a peck of dirt before we die. It is common to hear military leaders say that an objective gained at an appalling cost in lives was cheaply had. So courts of law become hardened to the run of the mill and find it important to keep the calendar clear. We recognize that alert men are more apt to obtain justice and that he who sleeps on his rights is apt to lose them. But we do not expect that one who brings himself into court in the correct manner after lengthy proceedings earnestly urged with citation of supporting authority shall be bounced out again without a hearing. Even review by certiorari though not a matter of right is based on sound judicial discretion.

Sound judicial discretion within Supreme Court Rule 38 requires that the very important questions here raised, based upon long established rules of law be heard and an effort made to establish the true rule of law in a field where now the Commissioner rules as he deems advisable,

that is in his discretion, without regard to the plain language of regulations having the supposed dignity of law.

A summary of the brief in opposition shows that the Commissioner has not attempted to deny the construction we give to Reg. 80, Art. 47, nor that the deduction is one favored by the Congress and the Act, nor that a provision for charity is to be liberally, not narrowly, construed, that by Wisconsin law the transfer was treated as relating back to the date of death; that a discretionary power is not illegal; that the conditions in question were precedent and not subsequent, and that the transfers were mandatory and testamentary. All these things have sound judicial support and respect for court and counsel requires the opposition to treat them in a serious, not a frivolous manner. Petitioners in good faith have stated their argument with reasoning which they believe meritorious. At least it represents an honest struggle on behalf of truth and justice. It merits more than contempt in reply.

We call upon the Court to break the reign of silence which threatens to devastate petitioners' rights under the estate tax law. It is sometimes said that courts will spend a great deal of time and effort to discover the kernel of truth hidden in a mountain of chaff submitted in the form of a brief. We feel that petitioners' mountain of truth lies buried under a glume of chaff, and that the truth and justice of petitioners' case cries out through the interstices of the brief in opposition.

We respectfully urge the Court to take jurisdiction, grant the petition for certiorari and provide for the argument of the case along with the analogous case of *Merchants National Bank of Boston vs. Commissioner*, 132 F. (2) 483, *supra*.

Respectfully submitted,

PERRY J. STEARNS,

Counsel for Petitioners